

Message Text

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DRAFTED BY L/SCA:HRGAITHER; JUSTICE:JKEENEY:EDD

APPROVED BY L/M:KEMALMBORG

TREASURY - MR. J. CLAWSON

SEC - MR. I. PEARCE

L/T - MRS. E. MCDOWELL

EUR/CE - MR. B. FLATIN

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P 072214Z MAR 75

FM SECSTATE WASHDC

TO AMEMBASSY BERN PRIORITY

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E.O. 11652: N/A

TAGS: PFOR, CFED, SZ (JUDICIAL ASSISTANCE TREATY)

SUBJECT: SWISS TREATY AND SWISS IMPLEMENTING LEGISLATION.

REF: (A) BERN 890; (B) STATE 51666

1. PER REFTEL HERE FOLLOWS TEXT OF DRAFT EXCHANGE OF NOTES:

(BEGIN TEXT) I HAVE THE HONOR TO REFER TO THE TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE SWISS CONFEDERATION ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS, SIGNED AT BERN, MAY 25, 1973, AND THE DRAFT SWISS FEDERAL LAW ON THE TREATY WITH THE UNITED STATES OF AMERICA ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS.

IT IS THE VIEW OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA THAT PARAGRAPH 2 OF ARTICLE 26 OF THE DRAFT SWISS FEDERAL LAW APPEARS INCONSISTENT WITH THE OBLIGATIONS
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SET OUT IN PARAGRAPH 1 OF ARTICLE 12 OF THE TREATY.

THERE IS CONCERN THAT EVIDENTIARY MATERIALS OBTAINED PURSUANT TO THE APPLICATION OF PARAGRAPH 1 OF ARTICLE 12 OF THE TREATY MAY NOT BE ADMITTED INTO EVIDENCE IN THE COURTS IN THE UNITED STATES OF AMERICA. I HAVE, THEREFORE, BEEN REQUESTED TO ASCERTAIN THE PROCEDURES WHICH WOULD BE INVOKED UPON RECEIPT OF AN APPLICATION FROM THE CENTRAL AUTHORITY OF THE UNITED STATES PURSUANT TO THE PROVISIONS OF PARAGRAPH 1 OF ARTICLE 12 OF THE TREATY.

IT IS THE UNDERSTANDING OF MY GOVERNMENT THAT EVEN WHERE NO PROVISIONS FOR AN OATH OR AFFIRMATION EXIST UNDER THE APPLICABLE PROCEDURAL LAW, A WITNESS NONETHELESS WILL BE URGED TO AGREE TO GIVE HIS TESTIMONY PURSUANT TO FORMAL OATH OR AFFIRMATION.

IT IS ALSO THE UNDERSTANDING OF MY GOVERNMENT THAT THERE ARE PENAL SANCTIONS IN ALL CANTONS OF THE SWISS CONFEDERATION FOR WILLFULLY GIVING FALSE TESTIMONY, EVEN WHERE AN OATH OR AFFIRMATION IS NOT PROVIDED FOR IN THE PROCEDURAL LAW OF THE PARTICULAR CANTON. BASED ON THIS UNDERSTANDING IT IS AGREED THAT, IN THE EVENT A WITNESS DECLINES TO GIVE TESTIMONY UNDER A FORMAL OATH OR AFFIRMATION AND THERE IS NO SPECIFIC PROCEDURAL PROVISION FOR AN OATH OR AFFIRMATION IN THE APPLICABLE PROCEDURAL LAW, THE WITNESS WILL BE ADMONISHED TO TELL THE TRUTH PRIOR TO GIVING TESTIMONY AND WILL BE ADVISED OF THE CONSEQUENCES, UNDER THE APPROPRIATE CANTONAL LAW, OF HIS FAILURE TO TELL THE TRUTH AND OF THE FACT THAT THE TRANSCRIPT WILL REFLECT SUCH INSTRUCTIONS. IN ADDITION, AFTER THE TESTIMONY HAS BEEN TAKEN, THE WITNESS WILL SIGN THE TRANSCRIPT AFFIRMING THAT HIS TESTIMONY IS TRUE.

IF THE FOREGOING UNDERSTANDING IS LIKEWISE THE UNDERSTANDING OF THE GOVERNMENT OF THE SWISS CONFEDERATION, I WOULD APPRECIATE A CONFIRMATION FROM YOUR EXCELLENCY TO THAT EFFECT.

-- (SIGNED BY AMBASSADOR)

(END TEXT)

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2. PER REFTEL HERE FOLLOWS TEXT OF DRAFT AIDE-MEMOIRE:

(BEGIN TEXT) THE GOVERNMENT OF THE UNITED STATES OF AMERICA VIEWS PARAGRAPH 2 OF ARTICLE 26 OF THE DRAFT SWISS FEDERAL LAW ON THE TREATY WITH THE UNITED STATES OF AMERICA ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS AS BEING INCONSISTENT, IF NOT IN CONFLICT, WITH THE OBLIGATIONS SET

FORTH IN PARAGRAPH 1 OF ARTICLE 12 OF THE TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE SWISS CONFEDERATION ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS, SIGNED AT BERN, MAY 25, 1973. THE UNITED STATES GOVERNMENT VIEWS PARAGRAPH 1 OF ARTICLE 12 AS CREATING AN OBLIGATION ON EACH STATE TO SUPPLY TESTIMONY OR STATEMENTS UNDER OATH OR AFFIRMATION UPON EXPRESS REQUEST "EVEN IN THE EVENT NO PROVISIONS THEREFOR EXIST IN ITS PROCEDURAL LAW"

THE UNITED STATES GOVERNMENT PROPOSES AN EXCHANGE OF NOTES IN AN ATTEMPT TO RESOLVE WHAT IS CONSIDERED TO BE A POTENTIALLY SERIOUS OBSTACLE TO THE IMPLEMENTATION OF THE TREATY. THE PROCEDURE PROPOSED IS UNDERSTOOD TO BE COMPATIBLE WITH SWISS CANTONAL PROCEDURES AND IS THOUGHT TO BE ONE WHICH WOULD ENABLE THE IMPLEMENTATION OF PARAGRAPH 1 OF ARTICLE 12 OF THE TREATY IN A MANNER ACCEPTABLE TO COURTS IN THE UNITED STATES.

WHILE IT IS EXPECTED THAT THE PROPOSED PROCEDURE MAY WELL BE EFFECTIVE, IT MUST BE NOTED THAT SHOULD IT FAIL, THE UNITED STATES GOVERNMENT WOULD VIEW THE INABILITY OF THE SWISS CONFEDERATION TO CARRY OUT THE PROVISIONS OF THE TREATY AS A MATTER REQUIRED TO BE RESOLVED BY THE GOVERNMENT OF THE SWISS CONFEDERATION. (END TEXT)

3. THIS CABLE SHOULD BE UNCLASSIFIED WHEN THE NOTE AND AIDE-MEMOIRE HAVE BEEN DELIVERED. INGERSOLL

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